UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Cases 4-CA-36852 and 4-CA-36879

BEACON SALES ACQUISITION, INC.
D/B/A QUALITY ROOFING SUPPLY
COMPANY,

and

INTERNATIONAL UNION OF OPERATING
ENGINEERS LOCAL 542, AFL-CIO.

RESPONDENT BEACON SALES ACQUISITION, INC. D/B/A QUALITY ROOFING SUPPLY COMPANY'S REPLY BRIEF IN SUPPORT OF ITS EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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Respondent Beacon Sales Acquisition, Inc. ("Beacon") d/b/a Quality Roofing Supply Company ("Quality") respectfully submits this reply brief in response to the General Counsel's answering brief dated September 22, 2010.

I. **Relitigation of the Health Care Contribution Increase Charge <u>is Barred by the "With Prejudice" Withdrawal of the First Charge</u>**

In our opening brief, we explained that the ALJ correctly held that the Non-Board settlement required Charge 36509 ("First Charge") be withdrawn "with prejudice." In its opposition brief, the General Counsel asserts that the Non-Board Settlement did not specify that Charge 36509 was to be withdrawn with prejudice. Opposition Brief ("Opp.") at 10. Because the General Counsel did not file cross-exceptions, this argument should be rejected. Even if the General Counsel's argument is considered, it should be rejected because the ALJ also correctly held that the Union specifically requested that the First Charge be withdrawn with prejudice and that the Regional Director granted the Union's request. Decision at 8; Joint Exhibits 7 (requesting Charge 36509 be withdrawn "with prejudice") and 8 (granting that request). Thus, the relevant question for the Board is whether the ALJ erred in holding that a "with prejudice" withdrawal of the First Charge did not bar litigation of the Second Charge.

A. **Impasse in the Bargaining over the Annual Health Care Contribution Increases Allowed Quality to Implement Those Under the <u>Stone Container Exception to the Bottom Line Enterprises Rule</u>**

In our opening brief, we explained that the ALJ erred by holding that there was no support in the record for applying an exception to the so-called <u>Bottom Line Enterprises</u> rule, which generally holds that an employer may not implement a proposal based upon issue-specific impasse on a mandatory subject of bargaining absent overall contract impasse. Decision at 11. In response to the ALJ's decision, we explained that there is a well-settled exception to the Bottom Line Enterprises rule that allows implementation when impasse is reached in bargaining over annual events that arise during the course of overall collective bargaining. Stone Container Corporation, 313 NLRB 336 (1993). It is well-settled that the Stone Container exception applies to annual increases in employee health care contributions. Nabors Alaska Drilling, Inc., 341 NLRB 610, 613 (2004).

In its opposition brief, the General Counsel criticizes us for not raising the Stone Container exception before the ALJ. Opp. at 6. However, as we explained in our opening brief, p. 13, fn. 6, there was no reason for us to raise this before the ALJ because it was the ALJ who first raised Bottom Line Enterprises in his decision. Thus, the first time we could have responded to the ALJ's incorrect reliance upon Bottom Line Enterprises was in our exceptions.

As a fallback, the General Counsel offers that our reliance on Joint Exhibit 3 is not enough evidence to demonstrate that the health care bargaining issue was an annual one, giving rise to the Stone Container exception. Opp. at 6-7. The General Counsel's attack of Joint Exhibit 3 is unavailing because Joint Exhibit 3 could not have put the Union on clearer notice of the annual nature of the increase when it stated:

> Consistent with its *annual* practice, the Company intends to make the benefit changes below effective January 1, 2009 for all employees, including those represented by Local 542.

Id. (emphasis added). Indeed, how much more evidence would the General Counsel have us introduce on the point, especially in the face of no rebuttal evidence?

Moreover, the ALJ did not find that Joint Exhibit 3 was insufficient, but rather that there was "no evidence" to support the Stone Container exception. Decision at 11. The ALJ's decision clearly is incorrect, as the General Counsel seems to admit when attacking the sufficiency of Joint Exhibit 3.

Equally unavailing is the General Counsel's argument that Joint Exhibit 3 is inadmissible as "rank hearsay." Opp. at 7. The General Counsel should have raised any admissibility objection prior to entering into the stipulation, which provides for the "authenticity and admissibility of each of the Joint Exhibits." Joint Exhibit 1 (emphasis added). Because Joint Exhibit 3 is admissible and establishes that the health care increase is annual, the Stone Container exception applies. Thus, the ALJ incorrectly required overall contract impasse prior to implementation.

B. The Stipulation Does Not Prevent Reliance Upon The Res Judicata Effect of the With Prejudice Withdrawal of the First Charge

Our opening brief also explains that the ALJ erred by misapplying Quality's stipulation regarding bargaining. The ALJ selectively quotes from the stipulation in holding that Quality stipulated that it "implemented [health care premium increases] without affording the Union sufficient opportunity to bargaining them." Decision at 11. This quotation ignores the predicate to Quality's stipulation: "Consistent with its second amended answer in this matter." Joint Exhibit 2(s) at ¶ 5. We then explained the importance of this portion of the stipulation and why we chose not to litigate whether or not the parties actually reached impasse on the health care bargaining. Quality's Brief at 13-14.

The General Counsel misconstrues our argument by claiming that we are arguing that we reached impasse with the Union on health care bargaining. Opp. at 5 (§i.a.). Nothing could be farther from the truth, and Quality stands by its stipulation waiving "any defense to the allegation that bargaining was insufficient and will stand for purposes of this allegation on its affirmative defense that the Charge was withdrawn with prejudice." Joint Exhibit 2(s) ¶ 6.

What both the General Counsel and the ALJ miss is that Quality's Second Amended Answer (Joint Exhibit 2(s)) makes clear that Quality chose not to present any evidence as to the actual sufficiency of bargaining. Why? Because the "with prejudice" withdrawal of the health care "impasse" charge relieved Quality of the burden of having to establish at trial that impasse was reached in order to win, because impasse is deemed to have occurred. In other words, the "with prejudice" withdrawal makes it just like Quality had called all of its witnesses at the hearing on the First Charge and has "won" before the ALJ. Nowhere in its opposition does the General Counsel contest the ALJ's correct holding that the "with prejudice" withdrawal results in Charge 36509 being deemed to have been won by Quality. Decision at 8. Holding any way other than we suggest would render the "with prejudice" withdrawal meaningless. In other words, Quality would receive no benefit from the settlement agreement if there was no future bar to the need to litigate the impasse declaration which led to Charge 36509.

C. Neither The General Counsel nor The Union Presented Evidence That The Union Tried to Break the Impasse Prior to Implementation

In our opening brief, we explained that the ALJ erred by holding that, even if the parties' impasse in December 2008 was sufficient to allow implementation, Quality did not demonstrate that the parties still were at impasse on January 3, 2009 when the changes were implemented. The General Counsel argues that Quality did not introduce any evidence of what occurred between Quality's declaration of impasse and implementation. Opp. at 11. In so arguing, the General Counsel fails even to address, let alone distinguish, our citation to Tru-Serv Corp. v. NLRB, 254 F.3d 1105, 1116-17 (D.C. Cir. 2001), amended 201 US App Lexis 18759, cert. denied, 534 US 1139 (2002), which makes clear that it was not Quality's burden to establish the continuation of impasse in the brief period of time between "declaration" of impasse and the right to implement that flows from it pursuant to the Stone Container.[1] Here, as in Tru-Serv, neither the Union nor the General Counsel introduced any evidence that the Union contacted Quality to try to break the impasse. In the absence of any such evidence, Quality remained free to implement its proposal in the first pay period of 2009.

D. The ALJ Erred by Focusing on Whether the Union Intended to Waive its Right to Challenge Implementation, Because the "With Prejudice" Withdrawal of the First Charge Renders The Union's Intent Irrelevant

In our opening brief, we explained that the ALJ also erred by holding that even if the parties were at impasse and that the impasse allowed Quality to implement, there was no evidence that the Union intended to waive its right to challenge implementation as opposed to impasse. Decision at 10. The General Counsel parrots the ALJ's holding and makes no effort to address the cases cited in our brief holding that absent a clear carve-out in the parties' settlement, the parties' intent is irrelevant to the res judicata effect of a "with prejudice" withdrawal. See, e.g., May v. Parker-Abbott Transfer and Storage, Inc., 899 F.2d 1007, 1010-11 (10th Cir. 1990) (where settlement agreement fails to preserve certain claims, res judicata effect of with prejudice withdrawal broad and court will not examine intent).

Most glaringly, despite that we raised the ALJ's failure to address or distinguish our reliance on the Fifth Circuit's recent decision in Oreck Direct, LLC v. Dyson, Inc., 560 F.3d 398, 402 (5th Cir. 2009), which is four-square with this case, the General Counsel fails to address it too. See Quality Opening Brief at fn 11, p. 16. Instead, the General Counsel

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[1] In Tru-Serv, impasse was declared on August 29, 1995 and the Company implemented 8 days later, on September 6, 1995. Here, Quality implemented in almost precisely the same time frame.

merely repeats the ALJ's reliance on Metropolitan Edison Company v. NLRB, 460 U.S. 393 (1983), which is inapposite because it does not address an effort to re-litigate a claim dismissed either with or without prejudice by virtue of a settlement agreement. Opp. at 12.

The logic espoused in Oreck applies here. Both the First Charge and the Second Charge relate to Quality's alleged failure to bargain sufficiently to declaration of impasse and provide required documentation in December 2008 prior to the January implementation of the Company-wide increase. That the Second Charge specified the improper act as the implementation and the First Charge specified the impasse declaration is inconsequential, because reaching impasse allows implementation (under the Stone Container exception). Both Charges involved the very same series of events that occurred in precisely the same time frame: the bargaining prior to the January 2009 health care contribution increase. That is dispositive under Oreck.

E. Auto Bus and Septix are Reconcilable and Both Lead to the Conclusion that The Non-Board Settlement Agreement Should be Enforced

In our opening brief, we explained that the ALJ's final error is his holding that the Board's decisions in Auto Bus, Inc., 293 NLRB 855 (1989) and Septix Waste, Inc., 346 NLRB 50 (2006) are irreconcilable and leave unclear the state of the law on the enforceability of settlement agreements reviewed, but not executed, by a Regional Director. Decision at 8. In its opposition, the General Counsel agrees that the cases are reconcilable, but argues that absent the Regional Director's actual signature on an agreement, the Regional Director cannot be bound. Opp. at 9-10. That is not the law.

As to Auto-Bus/Quinn Company, the General Counsel incorrectly claims that the Regional Director merely "was aware of the settlement." Opp. at 9. Not so, as our opening brief reviews the overwhelming and unrebutted evidence in the record that the Regional

Director "thoroughly investigated" and directed the Non-Board settlement, which is what the cases hold is necessary to make it binding. The General Counsel fails to recognize that the stipulation is the equivalent of: (i) our calling as witnesses at trial Ed Bonnet and Peggy McGovern, the Regional Director's counsels, and having them attest to the contents of the e-mails they authored appears in within Joint Exhibits 8-17 and then having them admitted into evidence, followed by (ii) no cross-examination or offer of rebuttal evidence from the Regional Director. In the face of our evidence, it certainly was within the Regional Director's prerogative to reject the stipulation and offer cross-examination of these witnesses. That the Regional Director failed to do so does not mean that the Board can ignore the plain meaning of the evidence actually in the record, which shows that the Regional Director only agreed to approve the settlement if Quality accepted the revisions dictated by the Regional Director through her counsel. How much more participation could a Regional Director have in the process? Indeed, by agreeing through her counsel to dismiss the charges once Quality made the changes, the Regional Director so much as affixed her signature to the agreement. Auto-Bus/Quinn Company hold that a Regional Director may be bound in such circumstances.

As to Septix, the General Counsel asserts that there is no evidence that the parties' intention in the settlement was to bring to a close all then-pending matters. Opp. at 10. This argument is frivolous in the face of Joint Exhibit 15, authored by Ms. McGovern, which states that the settlement was deigned to "bring all outstanding unfair labor practice charges to a final result." Id. (emphasis added). Again, what more evidence would the General Counsel like Quality to have introduced on this point, especially in light of the Regional Director's admissions?

In light of the Regional Director's admissions, there can be no doubt as to the underlying intention of the parties, which is what Septix directs the Board to follow:

> The Board's long-standing and well established policy is to favor [] private agreements . . . . This policy of encouraging the peaceful settlement of labor disputes can only be effective if the parties to agreements are not able to circumvent the agreements by later reviving those disputes.

346 NLRB 50 (2006).

II. Quality is Entitled to the Benefit of the Ground Rules Agreement

The General Counsel did not file cross-exceptions and thus cannot contest the ALJ's rejection of the General's Counsel's argument that "Ground Rules" agreements are not enforceable as to allegedly permissive subjects such as mediation. Opp. at 13; Decision at 12-15. As a result, the General Counsel defends the ALJ's ruling that, even though the agreement states that the parties "agree to utilize the FMCS mediator during their negotiations," it did not provide that the parties "exclusively" would use a federal mediator. The General Counsel did not argue below for this interpretation of the Interim Agreement.

The General Counsel does not quarrel with the contract interpretation principle that "the plain and unambiguous meaning of an instrument is controlling." WMATA v. Mergentime Corp., 626 F.2d 959, 961 (D.C. Cir. 1980). However, the General Counsel takes issue with our reliance upon Webster's first definition of the word "during," and instead offers what both Webster's and Dictionary.com set forth as the second meaning of the word. The Board need not entangle itself in a battle over which definition of "during" is more prevalent in American parlance, however, because only the definition offered by Quality makes sense within the context of the agreement. Using the General Counsel's definition would render the 30-day termination provision meaningless. On this point, we are baffled by the General Counsel's argument. The General Counsel argues that the termination provision applies only to the four provisions in the agreement that do not relate to overall contract bargaining. Opp. at 14. Not so. The termination provision applies to "This Agreement," not to certain subsections of the Agreement. Joint Exhibit 21, § 5. The General Counsel cannot pick and choose which provisions are covered by the termination provision and which are not. The only reasonable reading of the agreement is that the Union needed to provide 30-days notice of its unwillingness to proceed before the Federal mediator. If the word "during" is given the meaning suggested by the General Counsel – "at any point in time" – in the bargaining, then there would be no reason to have the termination notice because the Union would only have to appear before the mediator once and then would be free to bargain without a mediator and without providing the required notice. Such an interpretation would run afoul of the fundamental law of contract interpretation.

Finally, the General Counsel incorrectly argues that the "record is completely devoid" of any evidence that Quality offered to bargain after August 10 and thus the ALJ correctly rejected Quality's argument that any violation was so de minimis as to not warrant any remedy by the Board. The Complaint (which is part of the record) alleges only that Quality's refusal was for the 30-day period between July 9 and August 10, which by its terms presumes that Quality was prepared to bargain after August 10. In Joint Exhibit 23, Quality invited the Union to terminate the Interim Agreement, which the Union did through Joint Exhibit 24, sent on July 9. The Union's exercise of its termination right on July 9 is what gives rise to the "end date" of August 10, 2010 in the Complaint. Thus, contrary to the ALJ's order, relief could only be granted to the July 9-August 10 time frame, which already has passed, making this the paradigm de minimis issue.

Conclusion

When stripped to its essence, this case turns upon whether the Board holds settlement agreements to the same standard as other tribunals. It should be apparent to the Board that what occurred here is that the parties entered into the settlement agreements with pure intentions and abided by those agreements from February 2009 through the break-down of negotiation in June/July 2009. Thereafter, for whatever its reasons, the Union abrogated those agreements by: (i) re-raising the settled issue of the 2009 health care increases (to which the Union was mum when settling the cases in February) and (ii) demanding an immediate return to bargaining without the federal mediator. If the Board countenances the ALJ's strained interpretation of Board law, and evasion of Federal case law, in order to support his interpretation of these agreements, then litigants in Board cases will be reluctant to enter into settlements for fear that they will be breached with impunity when they no longer suit one of the parties thereto. That result would not comport with the Board's pronouncement that the NLRA is designed to achieve amicable resolution of Board cases. For the reasons set forth herein and in our opening brief, the Proposed Order should be rejected and the Consolidated Complaint should be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true copy of Respondent Beacon Sales Acquisition, Inc. D/B/A Quality Roofing Supply Company's Reply Brief In Support of Its Exceptions to the Decision of the Administrative Law Judge was served via electronic mail this 4th of October, 2010 upon:

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I also certify that I sent via electronic mail a copy to:

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